

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION**

ACTIVEVIDEO NETWORKS, INC.
Plaintiff/Counterclaim-Defendant,
v.

VERIZON COMMUNICATIONS, INC., VERIZON
SERVICES CORP., VERIZON VIRGINIA INC.
AND VERIZON SOUTH INC.
Defendants/Counterclaim-Plaintiffs.

Civil Action No. 2:10-cv-248
RAJ/DEM

**MEMORANDUM IN SUPPORT OF PLAINTIFF’S OPPOSITION TO DEFENDANT’S
MOTION FOR JUDGMENT AS A MATTER OF LAW ON INVALIDITY**

Plaintiff Activevideo Networks, Inc. (“ActiveVideo”) respectfully submits this opposition to Defendants Verizon Communications Inc., Verizon Services Corp., Verizon Virginia Inc., and Verizon South Inc. (collectively “Verizon”) Motion for Judgment as a Matter of Law On Invalidity. This issue has already been thoroughly briefed by ActiveVideo in its memorandum in support of its motion for judgment as a matter of law regarding validity of ActiveVideo’s asserted patents (“Memorandum in Support of JMOL Regarding Validity”), [D.E. 860], and in its supplemental brief to the same motion (“Supplemental Brief”). [D.E. 884]

I. Verizon Cannot Meet the Required Clear and Convincing Standard Without Presenting Proper Expert Testimony

ActiveVideo’s asserted patents are “sufficiently complex to fall beyond the grasp of an ordinary layperson,” therefore, the jury must be aided by “expert testimony in order to establish invalidity.” *Proveris Sci. Corp. v. Innovasystems, Inc.*, 536 F.3d 1256, 1267 (Fed. Cir. 2008). For the reasons explained in Memorandum in Support of JMOL Regarding Validity, section III.A, Verizon’s expert, Mr. Schmandt, failed to apply the proper evidentiary standard to his opinion on invalidity, and his testimony was generally void of substantive analysis of the alleged

prior art references. *See also* Supplemental Brief. His testimony, therefore, should be stricken in its entirety. *Id.* As explained by the Federal Circuit

[t]ypically, testimony concerning anticipation must be testimony from one skilled in the art and **must identify each claim element, state the witnesses' interpretation of the claim element, and explain in detail how each claim element is disclosed in the prior art reference.** The testimony is insufficient if it is merely conclusory.

Id. at 1152. (“**General and conclusory testimony . . . does not suffice as substantial evidence of invalidity.**” (emphasis added)).

Therefore, because (i) Mr. Schmandt applied the wrong evidentiary standard in forming his opinion on invalidity and (ii) failed to properly explain his opinion to the jury, the jury cannot rely on Mr. Schmandt's conclusory testimony to determine the validity of these complex patents. Accordingly, Verizon cannot meet its burden of proof by clear and convincing evidence to invalidate ActiveVideo's patents.

II. Conclusion

For the foregoing reasons, ActiveVideo respectfully requests that the Court deny Verizon's motion for judgment as a matter of law.

Dated: July 29, 2011

Respectfully submitted,

/s/ Stephen E. Noona

Stephen E. Noona
(Virginia State Bar No. 25367)
KAUFMAN & CANOLES, P.C.
150 W. Main Street, Suite 2100
Norfolk, VA 23510
Telephone : (757) 624-3000
Facsimile: (757) 624-3169
senoona@kaufcan.com

Nathan W. McCutcheon
(Virginia State Bar No. 36308)
David M. Morris
(Virginia State Bar No. 30146)

MORGAN, LEWIS & BOCKIUS LLP

1111 Pennsylvania Avenue, NW

Washington, DC 20004

Telephone: (202) 739-3000

Facsimile: (202) 739-3001

nmccutcheon@morganlewis.com

dmorris@morganlewis.com

Daniel Johnson, Jr.

Michael J. Lyons

Dion M. Bregman

Ahren C. Hoffman

MORGAN, LEWIS & BOCKIUS, LLP

2 Palo Alto Square

3000 El Camino Real, Suite 700

Palo Alto, CA 94306-2122

Telephone: (650) 843-4000

Facsimile: (650) 843-4001

djjohnson@morganlewis.com

mlyons@morganlewis.com

dbregman@morganlewis.com

ahoffman@morganlewis.com

Counsel for Plaintiff

CERTIFICATE OF SERVICE

I herby certify that on July 29, 2011, I will electronically file the foregoing with the Clerk of the Court using the CM/ECF system, which will send a notification of such filing (NEF) to the following:

Gregory N. Stillman
(Virginia State Bar No. 14308)
Brent L. VanNorman
(Virginia State Bar No. 45956)
HUNTON & WILLIAMS, LLP
500 E. Main Street, Suite 1000
Norfolk, VA 23514
Telephone: (757) 640-5314
Facsimile: (757) 625-7720
gstillman@hunton.com
bvannorman@hunton.com

Brian M. Buroker
(Virginia State Bar No. 39581)
Bradley T. Lennie
Justin T. Arbes
HUNTON & WILLIAMS, LLP
1900 K Street, NW
Washington, DC 20006
Telephone: (202) 955-1500
Facsimile: (202) 778-2201
bburoker@hunton.com
blennie@hunton.com
jarbes@hunton.com

Henry B. Gutman
Lisa H. Rubin
SIMPSON THACHER & BARTLETT LLP
425 Lexington Avenue
New York, New York 10017
Phone: (212) 455-2000
Fax: (212) 455-2502
hgutman@stblaw.com
lrubin@stblaw.com

Counsel for Defendants

/s/ Stephen E. Noona

Stephen E. Noona

(Virginia State Bar No. 25367)

KAUFMAN & CANOLES, P.C.

150 W. Main Street, Suite 2100

Norfolk, VA 23510

Telephone: (757) 624-3000

Facsimile: (757) 624-3169

senoona@kaufcan.com